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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JACOB PRECIADO, Defendant and Appellant.	F076863 (Super. Ct. No. VCF281317) **OPINION**

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

William P. Daley for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Kathleen A. McKenna and Timothy L. O'Hair, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

In 2013, defendant Jacob Preciado was charged with two counts of committing a lewd or lascivious act against a child under the age of 14 years between May 1, 2011, and May 31, 2011, in violation of Penal Code section 288, subdivision (a).[1, 2] In 2017, the jury convicted defendant of both counts and, as to count 2, found true the special allegation that defendant had "substantial sexual conduct with a victim who is under 14 years of age." (§ 1203.066, subd. (a)(8).)[3] The trial court sentenced defendant to the middle term of six years on count 2 and a concurrent middle term of six years on count 1.

On appeal, defendant advances seven claims. He argues that the alternative diagnostic evaluation proposed by the trial court pursuant to sections 1203.03, subdivision (a), and 1203.067, subdivision (a)(1), violated his right to equal protection under federal and state law; and he requests remand for a hearing on his eligibility for mental health pretrial diversion under section 1001.36. (Stats. 2018, ch. 34, § 24, pp. 34–37.) He also argues that the trial court abused its discretion in permitting the prosecutor to amend the information to conform to proof at trial; that his conviction on count 1, which is based on removal of the victim's underwear, is unsupported by substantial evidence of sexually motivated intent; and that within the context of instructing the jury on "substantial sexual conduct" under section 1203.066, subdivision (b), the trial court erred in defining "masturbation," requiring reversal per se. Lastly, defendant argues that the trial court erred in denying his motion for a new trial on the ground of ineffective

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1 All further statutory references are to the Penal Code unless otherwise noted.

2 Section 288 was amended effective January 1, 2019, but that amendment, which concerns the definition of a dependent person, is not relevant in this case. (Stats. 2018, ch. 70, § 2, pp. 2–4.)

3 Effective January 1, 2019, section 1203.066 and section 1203.67, cited *post*, were amended to reflect that section 288a was renumbered to section 287. (Stats. 2018, ch. 423, §§ 93–94, pp. 160–164.)

assistance of counsel and that the trial court erred in failing to stay his sentence on count 1 under section 654.

The People concede that in light of the California Supreme Court's recent decision in *People v. Frahs*, defendant is entitled to a conditional, limited remand under section 1001.36. (*People v. Frahs* (2020) 9 Cal.5th 618, 624–625 (*Frahs*).) As for defendant's remaining claims, the People concede no errors and they contend additionally that any instructional error regarding section 1203.066, subdivision (b), was harmless.

We conclude that defendant lacks standing to raise an equal protection violation based on the court's proposed alternative diagnostic procedure because he did not suffer any injury traceable to the proposal. We also conclude that the trial court did not abuse its discretion in permitting the amendment to the information; that defendant's conviction on count 1 is supported by substantial evidence; and that even if we assume instructional error for the sake of argument, defendant's contention that the error is reversible per se is foreclosed under *People v. Aledamat* (2019) 8 Cal.5th 1, 8–9 (*Aledamat*) and whether reviewed under the federal or state standard, any error was harmless. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *People v. Watson* (1956) 46 Cal.2d 818, 837 (*Watson*).) Finally, we reject defendant's claims that the trial court erred in denying his motion for a new trial and in finding section 654 inapplicable to count 1. However, we agree that pursuant to *Frahs*, defendant is entitled to a conditional, limited remand under section 1001.36. (*Frahs, supra*, 9 Cal.5th at pp. 624–625.)

FACTUAL SUMMARY

In May 2011, H.L. was 11 years old and living in Porterville with her mother, older brother, two younger siblings and an uncle. Defendant, who is H.L.'s cousin and was then 20 years old, was visiting from out of town.[4] After H.L. went to bed for the night, defendant entered her bedroom and got in bed with her. H.L. was lying on her side

[4] The uncle who lived with H.L. and her family at the time is not defendant's father.

and defendant was behind her. He pulled down his swim shorts, pulled her pajama bottoms and underwear down, and licked and touched her breasts. H.L., who was 17 years old at the time of trial, testified that from behind, defendant penetrated her vagina with his penis, "[m]ost likely" touching her buttocks in the process. During the assault, H.L. tried to move away from defendant but he pulled her toward him.

H.L. was not sure how long the assault lasted, but it ended when her mother entered the bedroom, turned on the lights and screamed.[5] Defendant fell off the bed, pulled up his shorts and left the room with H.L.'s mother. H.L. heard her mother yelling at defendant and testified that her "uncle was there but he didn't do anything."

At the request of her mother, H.L.'s uncle and older brother, Charles, drove defendant back home. Approximately midway through the four-hour drive, Charles asked his uncle to pull over, and Charles and defendant got out. Charles asked if defendant touched H.L., and defendant nodded and said something to the effect of, "'I fucked up. Yeah. I fucked up.'" After asking defendant if he was ready, Charles hit defendant twice in the stomach. They then got back in the car and Charles's uncle drove defendant the rest of the way home.

The case was assigned to a deputy for investigation around June 6, 2011, and H.L. had a Child Abuse Response Team (CART) interview on June 9, 2011, an audio-video recording of which was played for the jury. During the interview, H.L. stated that defendant put the part between his legs inside her butt and it hurt. H.L. said defendant touched her below her waist, and she did not mention that he licked and touched her breasts or that he pulled her closer to him. At trial, H.L. testified that at 11 years old, she did not know how to explain things properly, and she was scared and felt pressure. She testified that she was better able to explain what happened at the age of 17 and that defendant's penis entered her vagina from behind.

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5 H.L.'s mother died several months prior to trial.

DISCUSSION

I. Equal Protection Claim: Proposed Alternative Diagnostic Evaluation

A. Procedural Background

The special allegation to count 2 under section 1203.066, subdivision (a)(8), provides, "Notwithstanding Section 1203 or any other law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, nor shall a finding bringing the defendant within the provisions of this section be stricken pursuant to Section 1385 for … [¶] … [¶] [a] person who, in violating Section 288 or 288.5, has substantial sexual conduct with a victim who is under 14 years of age." On April 29, 2014, prior to trial and over the prosecutor's objection, the trial court struck the special allegation and defendant pled no contest to counts 1 and 2 in exchange for an indicated sentence of eight years in prison, suspended; one year in county jail; and felony probation. (See *People v. Clancey* (2013) 56 Cal.4th 562, 570 [court may give an indicated sentence where the defendant pleads to all charges].) The trial court stated, again over the prosecutor's objection, that defendant could serve his time at Tarzana Treatment Centers, Inc. (Tarzana) in the residential inpatient program in which he was presently enrolled, and that it intended to refer defendant to Wasco or Delano for a 90-day evaluation followed by release to Tarzana. (§§ 1203.03, subd. (a), 1203.067, subd. (a)(1).)[6]

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[6] Section 1203.067 provides, in relevant part, "Notwithstanding any other law, before probation may be granted to any person convicted of a felony specified in Section 261, 262, 264.1, 286, 287, 288, 288.5, or 289, or former Section 288a, who is eligible for probation, the court shall … [¶] [o]rder the defendant evaluated pursuant to Section 1203.03, *or similar evaluation by the county probation department*." (*Id.*, subd. (a)(1), italics added [amended effective Jan. 1, 2019 (Stats. 2018, ch. 423, § 94, pp. 163–164) to reflect that § 288a was renumbered to § 287].)

Section 1203.03 provides, in relevant part, "In any case in which a defendant is convicted of an offense punishable by imprisonment in the state prison, the court, if it concludes that a just disposition of the case requires such diagnosis and treatment services as can be provided at a diagnostic facility of the Department of Corrections, may order that [the] defendant be placed temporarily in such facility for a period not to exceed 90 days, with the further provision in such

During the next hearing, held on June 19, 2014, the trial court reiterated its intention to impose a suspended prison sentence and refer defendant for a 90-day diagnostic examination, but stated it had learned the California Department of Corrections and Rehabilitation (CDCR) would bill the county approximately $20,000 for the diagnostic evaluation. It stated that given the prohibitive cost, the county and the probation department met to determine an alternative. However, neither the Department of Health and Human Services nor the probation department had the ability to facilitate a diagnostic evaluation and, therefore, the solution reached was to remand defendant into CDCR custody and refer the matter to Dr. Bindler, a clinical psychologist, for the diagnostic evaluation.

The prosecutor again objected to the indicated sentence and to the court striking the special allegation, thereby allowing probation consideration. The prosecutor also objected to the alternative solution proposed by the court, which the prosecutor described as financial consideration trumping the Penal Code. The trial court agreed with the prosecutor's concerns regarding the proposed substitute for the CDCR diagnostic evaluation, but stated that it was constrained by cost. The court then remanded defendant into custody, ordered a 90-day diagnostic evaluation through Tulare County rather than the CDCR, appointed Dr. Bindler to complete both a diagnostic evaluation and a report pursuant to section 288.1, and set the matter for further hearing on September 17, 2014.[7]

The prosecutor subsequently sought reconsideration of the order striking the special allegation and referring the matter to Dr. Bindler for a diagnostic evaluation. On

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order that the Director of the Department of Corrections report to the court his diagnosis and recommendations concerning the defendant within the 90-day period." (*Id.*, subd. (a).)

[7] Section 288.1 provides, "Any person convicted of committing any lewd or lascivious act including any of the acts constituting other crimes provided for in Part 1 of this code upon or with the body, or any part or member thereof, of a child under the age of 14 years shall not have his or her sentence suspended until the court obtains a report from a reputable psychiatrist, from a reputable psychologist who meets the standards set forth in Section 1027, as to the mental condition of that person."

July 25, 2014, the trial court released defendant on his own recognizance on the condition that he report to Tarzana immediately and set another hearing for September 17, 2014. Although the minute order for July 25, 2014, reflects that the motion for reconsideration was vacated, the record is silent on that issue.

Defendant failed to appear for the hearing set on September 17, 2014, and the trial court issued an arrest warrant, stayed until September 24, 2014. The prosecutor objected to the stay on the ground that in addition to failing to appear in court, she understood that defendant failed to report to Tarzana as ordered. Defense counsel represented that defendant reported to Tarzana, but the program declined to keep him in light of the pending charges and counsel had intended to address that matter during the hearing.[8]

At the next hearing on September 24, 2014, defendant again failed to appear and the trial court activated the bench warrant. Defense counsel informed the court that defendant was scheduled to meet with Dr. Bindler on September 19, 2014, but counsel was unaware if the meeting occurred.

Defendant thereafter appeared for a hearing on October 15, 2014, and the minute order reflects he did not enroll in the Tarzana program and did not appear for his previously scheduled appointment with Dr. Bindler. Subsequently, defendant withdrew his plea, the special allegation was reinstated and the matter was set for trial.

B. Summary of Parties' Arguments

On appeal, defendant claims that as a result of the trial court's financially motivated decision not to commit him to the CDCR for a diagnostic evaluation under section 1203.03, subdivision (a), his plea agreement was never executed and he asserts that the disparity in treatment between himself and similarly situated defendants

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8 As discussed in footnote 10, *post*, the record reflects defendant had previously been a patient at Tarzana.

prosecuted in counties without resource constraints violated his right to equal protection under the federal and state Constitutions.

In response, the People argue that defendant lacks standing to bring an equal protection claim because he did not suffer an injury traceable to lack of court funds. Alternatively, the People argue that defendant was not similarly situated to other state defendants because he was ineligible for probation under section 1203.066, subdivision (a)(8), and the court lacked the discretion to strike the enhancement rendering him ineligible.

Defendant responds that the People's first "argument is in part speculation based on an incomplete record[,]" the county's failure to fund the diagnostic evaluation "created a great deal of confusion and frustrated the agreement[,]" and "[b]y the time confusion was resolved, the plea bargain had failed." Defendant contends that he never willfully failed to meet with Dr. Bindler and, as reflected in the probation report, he was in a treatment facility for seven months. With respect to the People's second argument, defendant states that the trial court was precluded from striking the special allegation only if the allegation was found true and, in accordance with *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), the court had discretion to strike the allegation.

C. Analysis

We agree with the People's first argument that defendant lacks standing to advance an equal protection challenge because he did not suffer any "'injury in fact'" traceable to the trial court's decision not to refer him to the CDCR for the diagnostic evaluation. (*Powers v. Ohio* (1991) 499 U.S. 400, 411; see *Teal v. Superior Court* (2014) 60 Cal.4th 595, 599.) Therefore, we need not reach the People's second argument that defendant was ineligible for probation because the trial court lacked the authority to

strike the special allegation precluding probation.[9] (§ 1203.066, subd. (a); *People v. Cowan* (1987) 194 Cal.App.3d 756, 759.)

"The concept of equal treatment under the laws means that persons similarly situated regarding the legitimate purpose of the law should receive like treatment. [Citation.] '"The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." [Citations.] This initial inquiry is not whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged."'" (*People v. Morales* (2016) 63 Cal.4th 399, 408; accord, *In re C.B.* (2018) 6 Cal.5th 118, 134; *People v. Valencia* (2017) 3 Cal.5th 347, 376; *Briggs v. Brown* (2017) 3 Cal.5th 808, 842; *People v. Cruz* (2012) 207 Cal.App.4th 664, 674.)

As a threshold matter, '"'[o]ne who seeks to raise a constitutional question must show that his rights are affected injuriously by the law which he attacks and that he is actually aggrieved by its operation." [Citation.]'" (*People v. Superior Court (Manuel G.)* (2002) 104 Cal.App.4th 915, 934, quoting *People v. Cortez* (1992) 6 Cal.App.4th 1202, 1212.) As the California Supreme Court has explained, "'standing to invoke the judicial process requires an actual justiciable *controversy* as to which the

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9 Pursuant to section 1203.066, subdivision (a)(8), count 2 included the special allegation that defendant had "substantial sexual conduct with" H.L. This allegation, if found true, renders a defendant categorically ineligible for either probation or a suspended sentence, and the finding may not be stricken pursuant to section 1385. (§ 1203.066, subd. (a).) We note that in *People v. Cowan*, cited by the People, the Court of Appeal held that "courts cannot circumvent the clear statutory requirement by striking the [section 1203.066] allegation before a finding is formally made, and denying the prosecution at least an initial attempt to prove it." (*People v. Cowan*, *supra*, 194 Cal.App.3d at p. 759.) Although defendant relies on *Romero* for the proposition that the court had discretion to strike the allegation, *Romero* interpreted section 667, subdivision (f), of the "Three Strikes" Law, which expressly permitted the prosecutor to strike a prior conviction allegation under section 1385. (*Romero, supra*, 13 Cal.4th at p. 508.) In that case, the court recognized that the Legislature may, by clear direction, eliminate judicial power to strike a sentencing allegation. (*Id.* at p. 518.)

complainant has a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator. [Citations.] *To have standing, a party must be beneficially interested in the controversy*; that is, he or she must have "some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large." [Citation.] The party must be able to demonstrate that he or she has some such beneficial interest that is concrete and actual, and not conjectural or hypothetical.'" (*Teal v. Superior Court*, *supra*, 60 Cal.4th at p. 599, quoting *Holmes v. California Nat. Guard* (2001) 90 Cal.App.4th 297, 314–315; accord, *People ex rel. Becerra v. Superior Court* (2018) 29 Cal.App.5th 486, 495–496; see *Lujan v. Defenders of Wildlife* (1992) 504 U.S. 555, 560–561 [setting forth elements of standing under federal Constitution].)

Defendant characterizes the People's standing argument as speculative based on an incomplete record, but "[o]n appeal, we assume a judgment is correct and the defendant bears the burden of demonstrating otherwise." (*People v. Thompson* (2016) 1 Cal.5th 1043, 1097, fn. 11, citing *People v. Garza* (2005) 35 Cal.4th 866, 881; accord, *People v. Garcia* (2018) 29 Cal.App.5th 864, 871; *People v. Cardenas* (2015) 239 Cal.App.4th 220, 227.) Based on the record in this case, the disintegration of defendant's plea for an indicated sentence is not attributable to deficiencies with the alternative diagnostic evaluation proposed by the court in July 2014, which forms the foundation of defendant's equal protection claim. Rather, in September 2014, defendant failed to appear for two court hearings and, in between those hearings, he failed to appear for his scheduled meeting with Dr. Bindler. Although defendant asserts that he was in a different treatment program at the time, the record reflects that defendant was aware of the court's order, the upcoming hearings and his appointment with Dr. Bindler; his whereabouts were within his knowledge; and his interests were represented by counsel,

who was apparently unaware of any explanation for defendant's failure to appear.[10] Moreover, whatever the reason for defendant's failure to appear, it remains, so far as we are able to discern from the record, that his plea fell apart as a result and, therefore, the court's proposed diagnostic evaluation procedure never came to pass. Under these circumstances, defendant cannot show he suffered an injury traceable to the court's decision to refer him to Dr. Bindler rather than to the CDCR for the diagnostic evaluation.

In light of defendant's failure to demonstrate standing to challenge the allegedly unconstitutional diagnostic evaluation procedure, we do not reach the merits of his equal protection claim. (*People ex rel. Lynch v. Superior Court* (1970) 1 Cal.3d 910, 912 ["The rendering of advisory opinions falls within neither the functions nor the jurisdiction of this court."]; accord, *Municipal Court v. Superior Court (Gonzalez)* (1993) 5 Cal.4th 1126, 1132; *People ex rel. Becerra v. Superior Court, supra,* 29 Cal.App.5th at p. 497.)

II. Remand Request for Eligibility Determination Under Section 1001.36

Defendant was convicted on August 3, 2017, and sentenced on January 8, 2018. Effective June 27, 2018, the Legislature added section 1001.36 to the Penal Code. (Stats. 2018, ch. 34, § 24, pp. 34–37.) Pursuant to section 1001.36, certain defendants suffering from mental disorders may be eligible for pretrial diversion (§ 1001.36, subd. (a)), which is defined as "postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment[]" (§ 1001.36,

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10 While defendant claims on appeal that he was in a program for seven months after being rejected by Tarzana, that claim is based on a statement in the probation report that defendant "reportedly" entered the Hawaiian Island Recovery Center in 2014 and was there for seven months. However, the specifics and source of that information are unclear; and we observe that defendant was present in court on July 25, 2014, and then again three months later on October 15, 2014. Further, the psychological evaluation submitted by the defense for consideration at sentencing reflects that, based on a record review, defendant received inpatient substance abuse treatment at Tarzana between late February and mid-June 2014.

subd. (c)). "If the defendant has performed satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion…." (§ 1001.36, subd. (e).)

There is evidence in the record that defendant may suffer from a qualifying mental disorder under subdivision (b)(1)(A) of section 1001.36. Relying on the Court of Appeal's decision in *People v. Frahs*, which held that section 1001.36 applies retroactively to all judgments not yet final on appeal, defendant seeks remand for a determination on his eligibility for diversion under section 1001.36. (*People v. Frahs* (2018) 27 Cal.App.5th 784, 791, review granted Dec. 27, 2018, No. S252220.) In their brief, the People argue that *People v. Frahs* was wrongly decided and section 1001.36 is not retroactive.

However, after briefing was complete, the California Supreme Court affirmed the decision in *People v. Frahs* and held that under the rule of *In re Estrada* (1965) 63 Cal.2d 740, section 1001.36 applies retroactively to all judgments not yet final on appeal. (*Frahs*, *supra*, 9 Cal.5th at pp. 624–625.) During oral argument, the People conceded defendant is entitled to remand under *Frahs*.

Accordingly, in light of *Frahs* and the existence of evidence in the record that defendant may suffer from a qualifying mental disorder, defendant is entitled to a conditional limited remand for an eligibility determination under section 1001.36. (*Frahs*, *supra*, 9 Cal.5th at pp. 624–625.) Pursuant to the procedure adopted in *Frahs*, "'[i]f the trial court finds that [the defendant] suffers from a mental disorder, does not pose an unreasonable risk of danger to public safety, and otherwise meets the six statutory criteria (as nearly as possible given the postconviction procedural posture of this case), then the court may grant diversion. If [the defendant] successfully completes diversion, then the court shall dismiss the charges. However, if the court determines that [the defendant] does not meet the criteria under section 1001.36, or if [the defendant]

does not successfully complete diversion, then his convictions and sentence shall be reinstated.'" (*Frahs, supra*, 9 Cal.5th at p. 637.) As remand is conditional, we turn to defendant's remaining claims.

III. Amendment of Information to Conform to Trial Evidence

A. Procedural Background

Based on H.L.'s statement during her CART interview, defendant was charged in count 2 of the information with committing the following lewd act in violation of section 288, subdivision (a): "penis to buttocks." (Full capitalization omitted.) Following H.L's trial testimony that defendant penetrated her vagina with his penis, the prosecutor moved to amend count 2 to reflect the lewd act in count 2 was "[p]enis to [g]enitals." Defense counsel objected that the term "'genitals'" was overly broad and that the amendment constituted a substantive change impacting the defense, but counsel did not request a continuance. The trial court concluded there was no prejudice to the defense and granted the motion.

B. Analysis

A prosecutor's right to amend the information is governed by statute. Section 1009 provides that "[a]n information may be amended 'for any defect or insufficiency, at any stage of the proceedings,' so long as the amended information does not 'charge an offense not shown by the evidence taken at the preliminary examination.' (§ 1009.) 'If the substantial rights of the defendant would be prejudiced by the amendment, a reasonable postponement not longer than the ends of justice require may be granted.' [Citation.] If there is no prejudice, an amendment may be granted 'up to and including the close of trial.'" (*People v. Goolsby* (2015) 62 Cal.4th 360, 367–368; accord, *People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1580–1581; *People v.*

Winters (1990) 221 Cal.App.3d 997, 1005.)[11] "'The questions of whether the prosecution should be permitted to amend the information and whether continuance in a given case should be granted are matters within the sound discretion of the trial court and its ruling will not be disturbed on appeal absent a clear abuse of discretion.'" (*People v. Hamernik* (2016) 1 Cal.App.5th 412, 424, quoting *People v. Winters*, *supra*, at p. 1005; accord, *People v. Arevalo-Iraheta*, *supra*, at pp. 1580–1581.)

Citing *People v. Gerber* (2011) 196 Cal.App.4th 368 (*Gerber*), defendant claims that the evidence presented at the preliminary hearing showed anal penetration, which did not support the "new charge" of vaginal penetration. Defendant argues, "Although charged under the general and ambiguous 288[, subdivision](a) statute, the two acts violate two different statutes: … section[s] 261 or 261.5, intercourse, and … section 286, sodomy." He also argues that different physical evidence is presented in a sodomy case versus a case involving vaginal penetration.

In *Gerber*, the defendant was charged, in relevant part, with two counts of furnishing a controlled substance, cocaine base, to a minor in violation of Health and

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11 Section 1009 provides in full, "An indictment, accusation or information may be amended by the district attorney, and an amended complaint may be filed by the prosecuting attorney, without leave of court at any time before the defendant pleads or a demurrer to the original pleading is sustained. The court in which an action is pending may order or permit an amendment of an indictment, accusation or information, or the filing of an amended complaint, for any defect or insufficiency, at any stage of the proceedings, or if the defect in an indictment or information be one that cannot be remedied by amendment, may order the case submitted to the same or another grand jury, or a new information to be filed. The defendant shall be required to plead to such amendment or amended pleading forthwith, or, at the time fixed for pleading, if the defendant has not yet pleaded and the trial or other proceeding shall continue as if the pleading had been originally filed as amended, unless the substantial rights of the defendant would be prejudiced thereby, in which event a reasonable postponement, not longer than the ends of justice require, may be granted. An indictment or accusation cannot be amended so as to change the offense charged, nor an information so as to charge an offense not shown by the evidence taken at the preliminary examination. A complaint cannot be amended to charge an offense not attempted to be charged by the original complaint, except that separate counts may be added which might properly have been joined in the original complaint. The amended complaint must be verified but may be verified by some person other than the one who made oath to the original complaint."

Safety Code section 11353, and the victim testified to three incidents of drug use with the defendant. (*Gerber, supra,* 196 Cal.App.4th at p. 372.) As to the first incident, the victim testified that the cocaine may have been cut with something; as to the second incident, she testified that the cocaine may have instead been meth because she felt wired; and as to the third incident, she testified that they used cocaine together. (*Id.* at pp. 374–375.) The second occasion of drug use occurred at a park in a different county and, after the close of evidence, the trial court granted the prosecutor's motion to amend the information to specify that count 4 was the first occasion and count 5 was the third occasion. (*Id.* at p. 372.)

The jury was instructed that "the People were required to prove that the 'controlled substance was cocaine and methamphetamine[,]'" and the prosecutor argued during closing that the defendant furnished or gave the victim "'cocaine and/or methamphetamine[]'" (*Gerber, supra,* 196 Cal.App.4th at p. 372). After the jury questioned whether "'meth'" was interchangeable with cocaine and whether the cocaine base specified in the two counts included "'meth[,]'" the trial court granted the prosecutor's motion to amend the information to "'cocaine base and/or methamphetamine.'" (*Id.* at p. 373.)

On appeal, the People conceded that methamphetamine is not a controlled substance within the meaning of Health and Safety Code section 11353, but they argued that furnishing methamphetamine to a minor is criminalized under section 11380 of the Health and Safety Code, and the two sections are virtually identical except for the drug type. (*Gerber, supra,* 196 Cal.App.4th at p. 387.) Therefore, they contended, the court's instruction to the jury was merely "'incomplete'" and the defendant's substantial rights were not affected. (*Ibid.*)

The Court of Appeal disagreed and concluded that "the court's supplemental instruction allowed each juror to conclude the controlled substance element of counts four and five had been proven if [the] defendant furnished either cocaine base or

methamphetamine. Thus, the instruction presented the jury with a legally incorrect theory on which to convict [the] defendant of violating Health and Safety Code section 11353." (*Gerber, supra,* 196 Cal.App.4th at p. 390.) The court further concluded that in light of the jury's questions and evidence the defendant was a regular methamphetamine user, it could not find that the instructional error was harmless beyond a reasonable doubt. (*Id.* at p. 391, citing *Chapman, supra*, 386 U.S. at p. 24.)

Relevant to defendant's claim here, the victim in *Gerber* testified at the preliminary hearing that she believed the cocaine used on the first occasion had been cut with methamphetamine, consistent with her trial testimony, but she did not mention methamphetamine with respect to the second uncharged incident or the third charged incident. (*Gerber, supra,* 196 Cal.App.4th at p. 389.) The appellate court observed in *Gerber* that "an amendment of the accusatory pleading to charge a violation of Health and Safety Code section 11380 as to the third furnishing incident would certainly have run afoul of section 1009." (*Ibid.*)

We find defendant's reliance on *Gerber* misplaced. The relevant convictions in *Gerber* were reversed based on prejudicial instructional error and, therefore, the court's comments regarding section 1009 were dicta. Regardless, *Gerber* involved a situation where the defendant was charged with furnishing cocaine base to a minor in violation of one section of the Health and Safety Code but because the jury was misinstructed, he may have been convicted on the legally invalid theory that he furnished the victim methamphetamine, which is a different offense criminalized in a separate section of the Health and Safety Code.

The proper focus of a claim that the trial court abused its discretion in permitting the information to be amended is on notice and the opportunity to present a defense, and that inquiry is viewed through the lens of the evidence presented at the preliminary hearing. (*People v. Arevalo-Iraheta, supra,* 193 Cal.App.4th at pp. 1580–1581; *People v. Peyton* (2009) 176 Cal.App.4th 642, 656–658; *People v. Pitts* (1990) 223 Cal.App.3d

606, 906.) "In cases involving sexual molestation of children, the function of the accusatory pleading is to give notice to the defendant of the nature of the offense charged and whether it occurred within the applicable limitations period." (*People v. Fernandez* (2013) 216 Cal.App.4th 540, 555.)

Here, defendant was neither charged with sodomy in violation of section 286 nor convicted of unlawful sexual intercourse under section 261.5 and, therefore, his reference to separate offenses criminalized under those statutes is entirely beside the point. Defendant was charged in both counts with committing a lewd or lascivious act under section 288, subdivision (a), and convicted of those offenses. The amendment in question was limited to expanding the lewd act to include vaginal penetration based on the victim's trial testimony, and defendant fails to explain how this was a material variance. (*People v. Calhoun* (2019) 38 Cal.App.5th 275, 306–307; *People v. Pitts*, *supra,* 223 Cal.App.3d at pp. 905–906.)

Defendant also asserts that the physical evidence, including forensic examination, will differ depending on whether the penetration is anal or vaginal. Assuming for the sake of argument that this contention has merit, it is nothing more than conjecture in this case, which did not involve collection or presentation of any physical evidence. Therefore, we find defendant's claim that the trial court abused its discretion in permitting amendment of the information to conform to the trial evidence unpersuasive.

IV. Substantial Evidence Challenge to Count 1

Defendant's conviction on count 1 is based on his act of pulling H.L.'s underwear down and his conviction on count 2 is based on his act of touching H.L.'s genitals with his penis. Defendant argues that pulling down H.L's underwear was merely preparatory for touching her genitals and, therefore, his conviction on count 1 is unsupported by substantial evidence of sexual intent. Defendant cites no authority for this proposition and we reject it as contrary to the law.

A. Legal Standard

"The Due Process Clause of the Fourteenth Amendment denies States the power to deprive the accused of liberty unless the prosecution proves beyond a reasonable doubt every element of the charged offense[]" (*Carella v. California* (1989) 491 U.S. 263, 265, citing *In re Winship* (1970) 397 U.S. 358, 364), and the verdict must be supported by substantial evidence (*People v. Zamudio* (2008) 43 Cal.4th 327, 357). On appeal, the relevant inquiry governing a challenge to the sufficiency of the evidence "'is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055.) "The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Zamudio*, *supra*, at p. 357.)

B. Analysis

"[S]ection 288 is violated by 'any touching' of an underage child accomplished with the intent of arousing the sexual desires of either the perpetrator or the child." (*People v. Martinez* (1995) 11 Cal.4th 434, 452; accord, *People v. Scott* (1994) 9 Cal.4th 331, 342–343 (*Scott*); *People v. Sigala* (2011) 191 Cal.App.4th 695, 700.) "Each individual act that meets the requirements of section 288 can result in a 'new and separate' statutory violation." (*Scott*, *supra*, at pp. 346–347, quoting *People v. Harrison* (1989) 48 Cal.3d 321, 329 (*Harrison*).) "[A] more lenient rule of conviction should not apply simply because more than one lewd act occurs on a single occasion." (*Scott*, *supra*, at p. 347, citing *People v. Bright* (1991) 227 Cal.App.3d 105, 109–110.)

"'[T]he trier of fact looks to all the circumstances, including the charged act, to determine whether it was performed with the required specific intent.'" (*People v. Martinez*, *supra*, 11 Cal.4th at p. 445, quoting *Scott*, *supra*, 9 Cal.4th at p. 344, fn. 7.) In this case, defendant entered the dark bedroom of his 11-year-old cousin, climbed into her

bed with her, removed his shorts, pulled her pajama bottoms and underwear down, fondled her breasts and then penetrated her with his penis. Unsurprisingly, the jury concluded that when defendant pulled H.L.'s underwear down, he did so with the requisite "intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child[.]" (§ 288, subd. (a).) The evidence supporting the jury's finding of sexual intent as to the act of removing H.L.'s underwear is substantial and defendant's claim to the contrary is without merit.

V. Instructional Error Claim

A. Background

Attached to count 2 was a special allegation of substantial sexual conduct within the meaning of section 1203.066, subdivision (a)(8), which, as previously set forth, provides, "Notwithstanding Section 1203 or any other law, probation shall not be granted to, nor shall the execution or imposition of sentence be suspended for, nor shall a finding bringing the defendant within the provisions of this section be stricken pursuant to Section 1385 for … [¶] … [¶] [a] person who, in violating Section 288 or 288.5, has substantial sexual conduct with a victim who is under 14 years of age." Subdivision (b) of section 1203.066 defines substantial sexual conduct as "penetration of the vagina or rectum of either the victim or the offender by the penis of the other or by any foreign object, oral copulation, or masturbation of either the victim or the offender."

The trial court instructed the jury on the special allegation as follows:

> "Now as to Count 2 there is a special allegation of substantial sexual conduct with the victim in this case who was under the age of 14. This means—substantial sexual conduct means penetration of the vagina or rectum of either the victim or of the offender by the penis of another or by any foreign object, oral copulation or masturbation of either the victim or the offender. [¶] *Masturbation means touching or contact, however slight, with the genitals of either the defendant or the victim* with the intent of arousing, appealing to or gratifying the lusts, passions or sexual desires of himself or the child. It is not necessary for the touching of the genitals to be made directly to the skin." (Italics added.)

Defendant did not object to the instruction in the trial court, but he claims on appeal that the trial court defined masturbation within the meaning of section 1203.066 incorrectly and that the error is reversible per se. Defendant argues that "[m]asturbation has a plain, everyday meaning that is commonly accepted. It is the manipulation of genitalia for the purpose of sexual arousal and satisfaction. It is not commonly understood to be the slightest touch, over or under clothing."

The jury was instructed with a definition of masturbation that originated in *People v. Chambless* (1999) 74 Cal.App.4th 773, 783, and was later applied to section 1203.066 in *People v. Terry* (2005) 127 Cal.App.4th 750, 772. Defendant criticizes the definition on the basis that *Chambless* was decided 15 years after the 1981 enactment of section 1203.066 and in extending the *Chambless* definition to section 1203.066, *Terry* failed to consider the Legislature's intent in 1981.

The People respond that defendant forfeited the claim by failing to object, the instruction was a correct statement of law and any error was harmless.

We need not decide whether defendant forfeited his claim of instructional error by failing to object or reach defendant's claim of error because even if we assume error for the sake of argument, it was harmless. (*People v. Johnson* (2016) 62 Cal.4th 600, 639; accord, *People v. Covarrubias* (2016) 1 Cal.5th 838, 919.)

B. Legal Standard

We review a claim of instructional error review de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 733; *People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) "In criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case." (*People v. Martinez* (2010) 47 Cal.4th 911, 953.) "[I]nstructions are not considered in isolation. Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury." (*People v. Holt* (1997) 15 Cal.4th 619, 677; accord, *People v. Thomas* (2011) 52 Cal.4th 336, 356.)

Jurors are presumed to have understood and followed the trial court's jury instructions. (*People v. Sandoval* (2015) 62 Cal.4th 394, 422.)

Error under state law is reviewed under the standard set forth in *Watson*, which requires a determination "whether there is a 'reasonable probability' that a result more favorable to the defendant would have occurred absent the error." (*People v. Aranda* (2012) 55 Cal.4th 342, 354, quoting *Watson, supra*, 46 Cal.2d at p. 837.) Error rising to the level of a federal constitutional violation is reviewed under the standard articulated in *Chapman*, which requires a determination "whether it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (*People v. Merritt* (2017) 2 Cal.5th 819, 831, citing *Neder v. United States* (1999) 527 U.S. 1, 18; *People v. Gonzalez* (2012) 54 Cal.4th 643, 663.) "[I]n order to conclude that an instructional error '"did not contribute to the verdict"' within the meaning of *Chapman* [citation] we must '"find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record"' [citations]." (*People v. Brooks* (2017) 3 Cal.5th 1, 70.)

C. Analysis

Relying on *Apprendi v. New Jersey* and without elaboration or citation to further authority, defendant takes the position that misinstruction on the definition of masturbation entitles him to reversal per se. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 ["Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."].) Defendant's reliance on *Apprendi* is of no assistance to him because while a factual finding under section 1203.066, subdivision (a)(8), renders a defendant ineligible for either probation or a suspended sentence, it does not increase the penalty for his offense. (§ 1203.066, subd. (a); *People v. Woodward* (2011) 196 Cal.App.4th 1143, 1152, quoting *People v. Benitez* (2005) 127 Cal.App.4th 1274, 1278 ["'[F]inding a defendant ineligible for probation is not a form of

punishment, because probation itself is an act of clemency on the part of the trial court.'"]; see *People v. Nunez and Satele* (2013) 57 Cal.4th 1, 39, fn. 6 [concluding that because the gang enhancement did not increase the mandatory minimum sentence for the murders committed by the defendants, the instructional error on the gang enhancement was one of state law and not a violation of the Sixth Amendment right to a jury trial under *Alleyne v. United States* (2013) 570 U.S. 99, 103].) Nor is defendant's claim that the instructional error is reversible per se well taken given the California Supreme Court's postbriefing decision in *Aledamat*, which addressed the split of authority on this issue and held that legally incorrect jury instructions are reviewable under the federal standard articulated in *Chapman*. (*Aledamat*, *supra*, 8 Cal.5th at pp. 11–13.)

In this case, even if we assume an error of federal constitutional magnitude, it was harmless beyond a reasonable doubt. As defendant points out, the prosecutor argued that both penetration and masturbation, defined as "touching or contact, however slight," occurred. However, this was not a complex case involving poorly defined events or spotty recollection. Other than whether the penetration was anal, as H.L. initially reported at age 11, or vaginal, as she testified at trial at age 17, this case did not involve conflicting evidence, and H.L. did not equivocate either at the time of the crime or at trial regarding the fact that penetration occurred. If the jury believed defendant sexually assaulted H.L. that night as charged in count 2, as the verdicts reflect it did, the state of the evidence was that either anal penetration or vaginal penetration occurred. Under these circumstances, any error regarding the definition of masturbation was harmless even under the more stringent *Chapman* standard.

VI. New Trial Motion

A. Procedural Background

After the jury trial in this matter, but prior to sentencing, defendant retained private counsel and the deputy public defender who tried the case withdrew from representation. After newly retained counsel subpoenaed records from Tarzana, he filed

a motion for a new trial on the grounds of newly discovered evidence that defendant was in inpatient treatment from May 6, 2011, to July 5, 2011, and, alternatively, that trial counsel rendered ineffective assistance by failing to investigate the matter and had he done so, "a more favorable verdict was likely."

After reviewing the motion, the trial court expressed skepticism that in the four years the case was pending before going to trial, neither defendant nor his family shared the information that defendant was in a treatment facility for the last three weeks of May 2011. The court noted that the case was filed in April 2013, private counsel was retained in June 2013, private counsel substituted out and the public defender was again appointed in December 2013, and then a second deputy public defender substituted in after the first attorney appointed left the office. The court determined it was necessary to hear from one of the two deputy public defenders who represented defendant, stating, "I just need to hear that from either [one] that they were aware of the information, and then for whatever reason decided not to use that. Then that goes to trial strategy. [¶] … I can't really base a decision on that without some information from them as to that [e]ffect either by way of a declaration or having them appear at a hearing on the matter."

Both deputy public defenders subsequently appeared for a hearing. The court noted that it spent a lot of time working with defense counsel prior to trial in an attempt to reach a disposition and "[n]ot once was it ever brought to my attention that the defendant may not have been the person who committed the crime because he was somewhere else. That was never brought up. It was never a situation where it was discussed with me that he did not do this. And he did not testify at his trial. So I don't see an ineffective assistance of counsel. [¶] I can only assume that your client, in the years that the public defender's office represented him, presented him with the information they needed to defend your client."

The trial court indicated it had only two questions: whether trial counsel was aware defendant was in treatment and if the decision not to use the information was

tactical. Trial counsel raised the issue of waiver before answering any questions. After the defense offered a limited waiver on the issue of whether it was a tactical decision not to present the evidence, trial counsel stated:

> "I'm sorry. I made a tactical decision in this case as in every case, based on my review of the file, the evidence gathered and my review and discussions with my client. I can't testify as to my tactical decisions based on one sentence or two conversations or even ten conversations because my review of the file encompassed any work the public defender's office had done on the case, spanning the entire time the case was filed we were appointed and then reappointed after private attorney represented [defendant]. I went through interviews he gave the interviewer from prior attorneys on the case. I didn't base it on one tactical decision, or the tactical decisions were made throughout the course of the trial, not based on one factor. There were multiple factors. I'm not going to testify based on a limited waiver of that privilege."

The trial court concluded the explanation was sufficient and denied the motion.

B. Summary of Parties' Arguments

On appeal, defendant claims that trial counsel refused to testify in the matter unless the defense entered a full waiver of privilege, and that the trial court agreed, stated it would deny the motion if privilege was not waived and then denied the motion when the defense refused to waive the privilege fully. Defendant argues that in accordance with Evidence Code section 958 and *People v. Ledesma* (2006) 39 Cal.4th 641, 690–695, the trial court should have directed trial counsel to answer and explain his actions, and the court's failure to do so was an abuse of discretion.

The People respond that defendant's failure to waive attorney-client privilege fully was not the ground on which the new trial motion was denied and because defendant failed to meet his burden of establishing ineffective assistance of counsel, the trial court did not abuse its discretion in denying the motion. We agree.

C. Legal Standard

Section 1181, subdivision (8), provides: "When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial

… [¶] … [¶] … [w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial. When a motion for a new trial is made upon the ground of newly discovered evidence, the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given, and if time is required by the defendant to procure such affidavits, the court may postpone the hearing of the motion for such length of time as, under all circumstances of the case, may seem reasonable."

In ruling on the motion, "'the trial court considers the following factors: "'1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.'" [Citations.]'" (*People v. Howard* (2010) 51 Cal.4th 15, 43, quoting *People v. Delgado* (1993) 5 Cal.4th 312, 328.)

With respect to ineffective assistance of counsel as grounds for a new trial, such claims are generally "'more appropriately decided in a habeas corpus proceeding.'" (*People v. Hoyt* (2020) 8 Cal.5th 892, 958 (*Hoyt*), quoting *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.) However, "a defendant may raise the issue of counsel's effectiveness as a basis for a new trial, and, to expedite justice, a trial court should rule '[i]f the court is able to determine the effectiveness issue on such motion.'" (*Hoyt*, *supra*, at p. 958, quoting *People v. Fosselman* (1983) 33 Cal.3d 572, 582–583.) "'[T]he defendant must first show counsel's performance was deficient, in that it fell below an objective standard of reasonableness under prevailing professional norms. Second, the defendant must show resulting prejudice, i.e., a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different.'" (*Hoyt*, *supra*, at p. 958, quoting *People v. Mai* (2013) 57 Cal.4th 986, 1009.) "To make out an ineffective assistance claim on the basis of the trial record, the

defendant must show '(1) the record affirmatively discloses counsel had no rational tactical purpose for the challenged act or omission, (2) counsel was asked for a reason and failed to provide one, or (3) there simply could be no satisfactory explanation. All other claims of ineffective assistance are more appropriately resolved in a habeas corpus proceeding.'" (*Hoyt, supra,* at p. 958, quoting *People v. Mai, supra,* at p. 1009.)

"'We review a trial court's ruling on a motion for a new trial under a deferential abuse-of-discretion standard.' [Citations.] '"A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion."'" (*People v. Thompson* (2010) 49 Cal.4th 79, 140; accord, *Hoyt, supra,* 8 Cal.5th at p. 957; *People v. Caro* (2019) 7 Cal.5th 463, 521.) "'[W]e review the ruling, not the court's reasoning and, if the ruling was correct on any ground, we affirm.'" (*People v. Zamudio, supra,* 43 Cal.4th at p. 352, fn. 11; accord, *People v. Brooks, supra,* 3 Cal.5th at p. 39.)

D. Analysis

1. Attorney-client Privilege Issue

With respect to the privilege issue raised by defendant, Evidence Code section 954 provides, in relevant part:

> "Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer if the privilege is claimed by:
>
> "(a) The holder of the privilege;
>
> "(b) A person who is authorized to claim the privilege by the holder of the privilege; or
>
> "(c) The person who was the lawyer at the time of the confidential communication, but such person may not claim the privilege if there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized to permit disclosure."

Evidence Code section 958, however, provides, "There is no privilege under this article as to a communication relevant to an issue of breach, by the lawyer or by the client, of a duty arising out of the lawyer-client relationship." In contrast with waiver, section 958 of the Evidence Code creates an *exception* to attorney-client privilege in situations such as this where the client accuses the lawyer of rendering ineffective assistance of counsel. (*People v. Ledesma*, *supra*, 39 Cal.4th at p. 691; accord, *In re Miranda* (2008) 43 Cal.4th 541, 555.) "The purpose of the exception … is to avoid the injustice of permitting 'a client either to accuse his attorney of a breach of duty and to invoke the privilege to prevent the attorney from bringing forth evidence in defense of the charge.…'" (*People v. Ledesma*, *supra*, at p. 694.)

Defendant claims that the trial court denied his motion based on his failure to waive attorney-client privilege fully and because this was error, he is entitled to reversal and remand to explore why counsel either failed to investigate the residential treatment program or failed to use the evidence. We disagree with this characterization of the record. Although trial counsel declined to elaborate, he did state he reviewed the entire file and made tactical decisions throughout the course of the case. The trial court was satisfied with that explanation and denied the motion.

To the extent that there was any misunderstanding or confusion regarding waiver of attorney-client privilege versus the exception to attorney-client privilege under Evidence Code section 958, defendant fails to persuade us that such misunderstanding or confusion on that issue led to the denial of his motion. As discussed next, defendant fails to demonstrate deficient performance by trial counsel or any prejudice, which is fatal to his claim that the trial court abused its discretion in denying his new trial motion.

2. Ineffective Assistance of Trial Counsel

Defendant moved for a new trial on two grounds: newly discovered evidence and ineffective assistance of counsel. He does not pursue his claim of newly discovered evidence on appeal and with good reason. The crimes occurred in 2011, defendant was

not charged until 2013 and the case did not go to trial until 2017. The evidence that defendant was in an inpatient treatment facility from May 6, 2011, to July 2011, was known to defendant and his family at the time charges were filed and as the case wended its way through the criminal justice system for years. Therefore, defendant was unable to show that he "'could not, with reasonable diligence, have discovered and produced [the evidence] at the trial.'" (*People v. Jimenez* (2019) 32 Cal.App.5th 409, 423, quoting section 1181, subd. (8).) Furthermore, "'"[a] new trial on the ground of newly discovered evidence is not granted where the only value of the newly discovered testimony is as impeaching evidence" or to contradict a witness of the opposing party[]'" (*People v. Jimenez*, *supra*, at p. 423, quoting *People v. Hall* (2010) 187 Cal.App.4th 282, 299), and as discussed in more detail, below, to the extent this evidence had any value, it was to impeach H.L. and Charles. Under these circumstances, defendant's claim that the evidence was newly discovered was unpersuasive. (*People v. Howard* , *supra*, 51 Cal.4th at p. 43.)

Turning to defendant's claim of ineffective assistance of counsel, defendant bears the burden of demonstrating both deficient performance and prejudice, as previously stated. (*Hoyt*, *supra*, 8 Cal.5th at p. 958; accord, *People v. Carrasco* (2014) 59 Cal.4th 924, 982.) The defense did not pursue a theory that defendant did not commit the crime and, notably, this is not a case where the crime occurred on a date certain such that defendant's admission to an inpatient facility would have demonstrated that he could not have committed the crime. A date range rather than an exact crime date was alleged in the information and nothing in the record points to an exact date, which is not surprising given that H.L. was an 11-year-old child and the crime was later reported by her elementary school rather than by her family. In considering defendant's new trial motion, the trial court expressly recognized the difficulty in pinning down precise dates in child molestation cases.

Based on the information available, the prosecutor alleged the assault occurred between May 1, 2011, and May 31, 2011. "The precise time at which the offense was committed need not be stated in the accusatory pleading, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense." (§ 955.) So long as defendant had notice of the charges against him and an adequate opportunity to defend against those charges, which he unquestionably did in this case, only a material variance regarding date range would be of concern. (*People v. Williams* (1945) 27 Cal.2d 220, 225–226; accord, *People v. Garcia* (2016) 247 Cal.App.4th 1013, 1022; *People v. Amperano* (2011) 199 Cal.App.4th 336, 343; see § 960; *People v. Obremski* (1989) 207 Cal.App.3d 1346, 1354.) Defendant was not at Tarzana the first five days of the charged time period and his own evidence submitted in support of his new trial motion places him in Porterville in 2011, albeit in February rather than May. Given that the precise date was simply not material on the facts of this case, trial counsel could reasonably have determined that there was no benefit to attempting to use evidence of defendant's unavailability during the last three weeks of May to impeach the witnesses regarding the timeframe and, further, that any such attempt might be viewed unfavorably by the jury.

In addition, this is not a case where there was doubt as to the perpetrator's identity. Because the victim and defendant are relatives who knew each other well, evidence that defendant was in an inpatient treatment facility for the last three weeks in May would have neither aided him in creating doubt as to his identification nor otherwise served to effectively undermine H.L.'s unequivocal testimony that defendant assaulted her during a visit.

We conclude that on this record, defendant cannot show "'counsel had no rational tactical purpose for the challenged act or omission'" or that "'there simply could be no satisfactory explanation.'" (*Hoyt*, *supra*, 8 Cal.5th at p. 958; accord, *People v. Carrasco*, *supra*, 59 Cal.4th at p. 982.) Furthermore, even if we assume deficient performance,

defendant cannot demonstrate "'a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have been different.'" (*Hoyt*, *supra*, at p. 958; accord, *People v. Carrasco*, *supra*, at p. 982.)

As stated, the crime was not reported immediately, H.L. was only 11 years old when she reported it had occurred about two weeks prior, and defendant was not in inpatient treatment until May 6, 2011. Defendant did not testify and, therefore, at best, trial counsel might have been able to attempt to impeach H.L. and her brother with respect to a portion of the timeframe in question. For the reasons already outlined, we are unpersuaded that if counsel had used this evidence to challenge the witnesses on a portion of the timeframe in question, there is a reasonable probability of a more favorable outcome. Accordingly, we reject defendant's claim that the trial court abused its discretion when it denied his motion for a new trial.

VII. Applicability of Section 654 to Count 1

A. Legal Standard

Finally, defendant claims that the trial court should have stayed his sentence on count 1 pursuant to section 654, which provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.…" (*Id.*, subd. (a).) The statute "expressly prohibits separate punishment for two crimes based on the same act, but has been interpreted to also preclude multiple punishment for two or more crimes occurring within the same course of conduct pursuant to a single intent." (*People v. Vargas* (2014) 59 Cal.4th 635, 642; accord, *Harrison*, *supra*, 48 Cal.3d at p. 335.)

Determining "[w]hether a defendant may be subjected to multiple punishment under section 654 requires a two-step inquiry …." (*People v. Corpening* (2016) 2 Cal.5th 307, 311.) "We first consider if the different crimes were completed by a 'single physical act.' [Citation.] If so, the defendant may not be punished more than once for that act.

Only if we conclude that the case involves more than a single act—i.e., a course of conduct—do we then consider whether that course of conduct reflects a single '"intent and objective"' or multiple intents and objectives." (*Ibid.*)

We review the trial court's express or implied factual findings for substantial evidence, and its conclusions of law de novo. (*People v. Brents* (2012) 53 Cal.4th 599, 618; *People v. Perez* (1979) 23 Cal.3d 545, 552, fn. 5; *People v. Moseley* (2008) 164 Cal.App.4th 1598, 1603.) We "affirm the trial court's ruling, if it is supported by substantial evidence, on any valid ground." (*People v. Capistrano* (2014) 59 Cal.4th 830, 886, fn. 14, overruled in part on another ground in *People v. Hardy* (2018) 5 Cal.5th 56, 103–104; accord, *People v. Brents*, *supra*, at p. 618.)

B. Analysis

In the trial court, defendant argued that under section 654, he could not be sentenced on both counts. The trial court disagreed, concluding, "The act of doing this, and then he left and then came back for the second situation. So it was two separate independent acts. I don't believe Count 2 is [section] 654 of Count 1."

Relying primarily on *People v. Greer*, defendant argues that his removal of H.L.'s underwear in count 1 and his penetration of her in count 2 occurred during a single course of brief conduct and only one sentence may be imposed. (*People v. Greer* (1947) 30 Cal.2d 589 (*Greer*), overruled on another ground in *People v. Fields* (1996) 13 Cal.4th 289, 308, fn. 6.) The People counter that for each act, defendant harbored a separate intent to arouse himself. We agree with the People and note that defendant's argument overlooks more recent authority in favor of cases that predate *Harrison*, discussed next.[12]

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12 *Greer* did not expressly resolve a claim of multiple punishment under section 654 and in *People v. Pearson*, the California Supreme Court noted that in addressing the defendant's claim that it was improper to convict him both of lewd and lascivious conduct and statutory rape, the *Greer* court "used the terms 'conviction' and 'punishment' interchangeably …." (*People v. Pearson* (1986) 42 Cal.3d 351, 358, disapproved on another ground in *People v. Vidana* (2016) 1 Cal.5th 632, 651.) The court concluded that the discussion in *Greer* "was essentially dictum

We decline defendant's invitation to disregard the law governing section 654 as it presently stands.

This case does not involve a single physical act and, therefore, we focus on the second step of the analysis governing section 654: whether the crimes were "'a course of conduct deemed to be indivisible in time.'" (*Harrison*, *supra*, 48 Cal.3d at p. 335, quoting *People v. Beamon* (1973) 8 Cal.3d 625, 639; accord, *People v. Corpening*, *supra*, 2 Cal.5th at p. 311.) Generally, """[w]hether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one."'" (*People v. Capistrano*, *supra*, 59 Cal.4th at p. 885, quoting *People v. Rodriguez* (2009) 47 Cal.4th 501, 507.) However, "'[b]ecause of the many differing circumstances wherein criminal conduct involving multiple violations may be deemed to arise out of an "act or omission," there can be no universal construction which directs the proper application of section 654 in every instance.'" (*People v. Hicks* (2017) 17 Cal.App.5th 496, 514, quoting *People v. Beamon*, *supra*, at p. 636; accord, *Harrison*, *supra*, 48 Cal.3d at

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because the court had already determined that the judgment would be reversed on [double jeopardy] before it reached this issue." (*Pearson*, *supra*, at p. 358.)

Defendant also cites to *People v. Bevan* for the proposition that """'technical fragmentation'" of a course of lewd and lascivious conduct could not be resorted to in order to create multiple sexual offenses' and that '[u]nder such circumstances not only the multiple punishment, but also the multiple conviction must be set aside.'" (*People v. Bevan* (1989) 208 Cal.App.3d 393, 401, quoting *Hankla v. Municipal Court* (1972) 26 Cal.App.3d 342, 358, disapproved on another ground by *Owens v. Superior Court* (1980) 28 Cal.3d 238, 249, fn. 10.) However, in *Scott*, *supra*, 9 Cal.4th at pages 347–348, the California Supreme Court disapproved *People v. Bevan* and *People v. Bothuel* (1988) 205 Cal.App.3d 581 on the ground that they did not "properly analyze the circumstances under which a defendant may be separately convicted under section 288 for separate lewd acts committed in a single encounter." Noting that both cases were decided prior to *Harrison* (*Scott*, *supra*, at p. 347), the court observed that "courts no longer assume that fondling offenses are 'incidental' to other sex crimes within the meaning of section 654, or that they are exempt from separate punishment. The newer cases tend to focus on evidence showing that the defendant independently sought sexual gratification each time he committed an unlawful act[]" (*id.* at p. 347, fn. 9).

p. 336.) Section 654 "is intended to ensure that [the] defendant is punished 'commensurate with his culpability[]'" (*Harrison, supra,* at p. 335), and the California Supreme Court has cautioned that "a 'broad and amorphous' view of the single 'intent' or 'objective' needed to trigger the statute would impermissibly 'reward the defendant who has the greater criminal ambition with a lesser punishment[]'" (*id.* at pp. 335–336, quoting *People v. Perez, supra,* 23 Cal.3d at pp. 552–553).

Thus, "'[i]f [the defendant] entertained multiple criminal objectives which were independent of and not merely incidental to each other, he may be punished for independent violations committed in pursuit of each objective even though the violations shared common acts or were parts of an otherwise indivisible course of conduct.'" (*People v. Porter* (1987) 194 Cal.App.3d 34, 38, quoting *People v. Beamon, supra,* 8 Cal.3d at p. 639; accord, *Harrison, supra,* 48 Cal.3d at p. 335; *People v. Tom* (2018) 22 Cal.App.5th 250, 260.) "Whether the defendant maintained multiple criminal objectives is determined from all the circumstances and is primarily a question of fact for the trial court, whose finding will be upheld on appeal if there is any substantial evidence to support it." (*People v. Porter, supra,* at p. 38, citing *People v. Goodall* (1982) 131 Cal.App.3d 129, 148; accord, *People v. Tom, supra,* at p. 260.) "'The temporal proximity of the two offenses is insufficient by itself to establish that they were incident to a single objective.'" (*People v. Jackson* (2016) 1 Cal.5th 269, 354, quoting *People v. Capistrano, supra,* 59 Cal.4th at p. 887; accord, *Harrison, supra,* at p. 335.)

We conclude the trial court's determination that defendant harbored multiple objectives is supported by substantial evidence. Defendant entered H.L.'s bedroom, got into her bed, removed her pajama bottoms and underwear, and removed his shorts. H.L. testified defendant then "started with [her] upper body," and licked and touched her breasts before touching her butt with his hands and then penetrating her with his penis. Additionally, notwithstanding defendant's contrary assertion, the evidence does not

establish that the encounter was merely momentary. During her CART interview, H.L. estimated that the assault lasted 10 or 20 minutes and, at trial, she did not recall.

A defendant who commits a number of different sex acts may be separately punished for each act where "[n]one of the sex offenses was committed as a means of committing any other, none facilitated commission of any other, and none was incidental to the commission of any other." (*People v. Perez*, *supra*, 23 Cal.3d at pp. 553–554; accord, *Harrison*, *supra*, 48 Cal.3d at p. 336.) On the facts of this case, we do not agree that defendant's removal of H.L.'s underwear was merely incidental to the penetration. Rather, defendant's acts of removing H.L.'s underwear and subsequently penetrating her evidence intent, with each act, to arouse or gratify his lust, passion or sexual desire. (§ 288, subd. (a).) This conclusion is also consistent with "the purpose of section 654 … to ensure that a defendant's punishment will be commensurate with his culpability[]" (*People v. Correa* (2012) 54 Cal.4th 331, 341), and "a 'defendant who attempts to achieve sexual gratification by committing a number of base criminal acts on his victim is substantially more culpable than a defendant who commits only one such act[]'" (*Harrison*, *supra*, at p. 336, quoting *People v. Perez*, *supra*, at p. 553). Therefore, we reject defendant's claim that the trial court erred under section 654 when it declined to stay his sentence on count 1.

DISPOSITION

The judgment is conditionally reversed and remanded for an eligibility determination under section 1001.36. In accordance with *Frahs*, *supra*, 9 Cal.5th at page 637, "'[i]f the trial court finds that [the defendant] suffers from a mental disorder, does not pose an unreasonable risk of danger to public safety, and otherwise meets the six statutory criteria (as nearly as possible given the postconviction procedural posture of this case), then the court may grant diversion. If [the defendant] successfully completes diversion, then the court shall dismiss the charges. However, if the court determines that [the defendant] does not meet the criteria under section 1001.36, or if [the defendant]

does not successfully complete diversion, then his convictions and sentence shall be reinstated.'"

MEEHAN, J.

WE CONCUR:

DETJEN, Acting P.J.

SMITH, J.